No. 10961

United States
Circuit Court of Appeals
For the Ninth Circuit

THOMAS W. NEALON,

Appellant,

v.

HARRY W. HILL, as Receiver of Intermountain Building & Loan Association, a corporation,

Appellee.

Reply Brief of Appellant

Upon Appeal From the District Court of the United States for the District of Arizona

LESLIE C. HARDY,
Attorney for Appellant

THOMAS W. NEALON,
In Propria Persona

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Reply Brief of Appellant

Counsel for the receiver, as appellee herein, have arranged their reply brief into subdivisions with headnotes (a) to (k). Uniformity suggests that counsel for appellant conform to the same arrangement and, accordingly, each subheading of appellee's brief will be restated by counsel for appellant in their alphabetical order and will be replied to in that order.

(a) *An Order or Decree Which Adjudges that an Attorney Is Entitled to Compensation in a Definite Amount and Allows a Lien Therefor on a Fund in Court, and Directs*

Payment, is a Final Order and Appealable although No Final Disposition Is Made of the Residue of the Fund.

Appellant has not asserted that the order entered December 7, 1942 (R. 243) was not a final order from which an appeal would lie. The discussion of that question is now academic.

Monaghan v. Hill (9 Cir.) 140 Fed (2) 31.

(b) *Appellant in His Attempted Appeal from the Order of December 7, 1942, Is Too Late, as an Appeal from Such an Order Must be Taken Within Three (3) Months from the Entry Thereof.*

The trial court examined and disposed of the petition filed March 31, 1944 to rehear the order of December 7, 1942. In such circumstances, the order of December 7, 1942 was appealable.

Bowman v. Lopereno, 311 U. S. 262, 61 S. Ct. 201, 85 L. Ed. 177.

Wayne United Gas Co. v. Owens-Illinois Co., 300 U. S. 131, 81 L. Ed. 557, 57 S. Ct. 382.

Pfister v. Northern Illinois Finance Corp., 317 U. S. 144, 87 L. Ed. 146, 63 S. Ct. 133.

(c) *The Order of November 29, 1944, Is Not a Final Decision Within the Meaning of Section 128 (a) of the Judicial Code, 28 U. S. C. A., Section 225 (a) and Is Not Appealable.*

The reply to subdivision (b) is applicable to this subdivision (c). Both orders are now appealable.

(d) *An Attorney Accepting the Benefits of a Final Order or Judgment and Retaining the Fee Allowed Thereby, Cannot Thereafter Appeal Therefrom.*

Appellant concedes that he accepted the check which was delivered to him by the receiver under the order entered December 7, 1942. Appellant contends that the acceptance of the check does not, on the record, deprive him of the right to appeal from the order of December 7, 1942 in an administrative proceeding in equity not closed. Appelant's contention in this respect is discussed in his opening brief, beginning at page 34. The substance of that argument is that one who accepts the benefits of an order, which confessedly he was entitled to receive in all events, does not estop one from claiming more when justly due. Appellant cited, among other cases, the following:

Embry v. Palmer, 107 U. S. 3, 2 S. Ct. 25, 27 L. Ed. 346;

Reynes v. Dumont, 130 U. S. 354, 9 S. Ct. 486, 32 L. Ed. 934;

Erwin v. Lowry, 7 How. (48 U. S.) 172, 184, 12 L. Ed. 655.

In addition, appellant invoked the rule, as announced by this Court, that when a court of equity appoints receivers, the allowances to their attorneys, being purely administrative, are subject to increase or decrease with the development of the administration.

Drilling & Exploration Corporation v. Webster, (9 Cir.) 69 Fed. (2) 416.

It seems significant that the foregoing decisions are not referred to by appellee, or distinguished in their application to this record on appeal.

Appellee invokes the Rule of Decisions Statute, R. S. §721, §725, Title 28, USCA.[1]

That stuatute applies to state decisions as well as to state statutes.

> *Russell v. Todd,* 309 U. S. 280, 60 S. Ct. 527, 84 L. Ed. 754.

But as recent as December 2, 1944 this Court has held that the conformity required of federal courts to state rules is "as near as may be" and was not intended to tie their hands when in their judgment it would "unwisely encumber the administration of the law, or tend to defeat the ends of justice, in their tribunals."

> *Murphy v. United States District Court, etc.* (9 Cir.) 145 Fed. (2d) 1018, 1019, 1020.

Notwithstanding, appellee argues the rule of decision in Arizona is that a party cannot accept the benefits of a judgment, order or decree and afterwards prosecute an appeal to review the same and cites:

> *Shannon Copper Co. v. Potter,* 14 Ariz. 481, 131 Pac. 157.

Subsequently, appellee cites to the same effect the following:

[1]The statute reads: "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Nowland et al v. Vinyard, 43 Ariz. 27, 29 Pac. (2) 139, 141;

Frankel v. Frankel, 41 Ariz. 396, 18 Pac. (2) 911, 913;

Webb v. Crane Co. 52 Ariz. 299, 80 Pac. (2) 698, 708.

The *Shannon Copper Company* case was an action at law, not an administrative proceeding in equity, for debt upon a single complaint in two counts. Judgment was entered upon a verdict returned only for part of one of the counts sued upon. Plaintiff, as judgment creditor, settled the amount of the judgment and appealed. The Supreme Court of Arizona held that the satisfaction of the judgment deprived the appellant from appealing in the hope of obtaining a more satisfactory judgment.

Here, we are treating with an administrative proceeding in equity not closed, which, as we have shown, in the opening brief, does not fall in the same category as an action at law, but is placed under the continuing control of the court so that orders in such equitable proceedings, although termed final orders, may be reexamined out of time.

Nowland et al v. Vinyard, supra, apparently is an incorrect citation. It does not treat upon the question involved.

Frankel v. Frankel, supra, was a divorce action and holds that the wife, who was without funds to prosecute an appeal, requested permission to accept funds deposited with the clerk as a result of the judgment. The trial court granted her request and the Supreme Court of Arizona held that by accepting the funds she had not waived her right to appeal.

Assuredly, that decision cannot help appellee's position because here, as appellant has shown in his opening brief, beginning at page 22, he reserved the right to claim an additional allowance for services performed in the creditors' suit, had not then claimed allowance for services performed on behalf of the receiver, and for services performed in the ancillary receiverships, and stated that a payment of $12,500 "will help an attorney to get along, especially after he has been out of money, as I have been in this case." (Opening brief, p. 25, R. 371).

Webb v. Crane, supra, has no application. There it appears that the judgment debtor satisfied the judgment and appealed. The decision, although it does not say so (80 Pac. (2)707-708) imports that the judgment debtor, as appellant, satisfied the judgment in order to prevent the seizure and sale of his property, and under such circumstances, estoppel did not arise so as to prevent appeal.

If we are seeking an applicable rule of decision of the Supreme Court of Arizona which this Court is required to invoke and follow, then we should look for a decision that fits into a proceeding founded in equity.

We cite: *Moore v. Meyers,* 31 Ariz. 519, 255 Pac. 164.[2]

The facts of that case disclose a contract for the purchase of real estate through an agent upon which the purchasers deposited with the agent $200.00 as earnest money. The transaction failed, and the action was for damages founded upon fraud in which defendants pleaded estoppel, asserting that plain-

[2]The decision cited was on rehearing. The original decision appears at 31 Ariz. 347, 253 Pac. 626. The action was founded upon fraud and estoppel, subjects of equity jurisprudence.

tiffs had accepted $100.00 as their one-half share of the purchase money which had been paid to the agent.

The Supreme Court of Arizona, by the opinion on rehearing, held that the acceptance of the fund did not create estoppel and said:

> "It is the rule of law that no estoppel arises by the acceptance of benefits when the person claiming the estoppel has not been injured. 21 C. J. 1137. If plaintiffs only accepted money which they were entitled to under any circumstances, defendants were not injured thereby, and no estoppel existed. *Hays v. Heidelberg,* 9 Pa. 203. Plaintiffs were therefore entitled to go to the jury on the whole case under proper instructions."

The decision of the Supreme Court of Arizona does not cite *Embry v. Palmer, Reynes V. Dumont, Erwin v. Lowry,* supra, invoked by appellant on page 37 of the opening brief. Nevertheless, the decision of the Supreme Court of Arizona and the decisions of the Supreme Court of the United States reach identical conclusions.

It is axiomatic that estoppel does not arise by the acceptance of the benefits of the judgment when the person claiming estoppel has not been injured.

Glendale v. Coquat, 46 Ariz. 478, 52 Pac. (2) 1178.

In re Bastanchury Corp. (9 Cir.) 66 Fed. (2) 653, 657.

Homer Fritch Inc. v. U. S. (9 Cir.) 234 Fed. 608.

Lebold v. Inland Steel Co. (7 Cir.) 125 Fed. (2) 369, 375.

Pomeroy Equity Jurisprudence, Vol. 3 (5th ed.) Sec. 805.

The receiver will not be injured by the payment of funds to appellant to which appellant is rightfully entitled. These funds do not belong to the receiver, but they are funds in his custody which are rightfully chargeable against the petitioning creditors, individually, and as a class, for whom appellant sued and who have accepted the benefits of the suit. In fact the unconscionable order of the trial court of December 7, 1942 enriched the receivership estate at the expense of appellant. Thus, it is appellant who in reality has been harmed and consequently it is not inappropriate to say that it is he who is rightfully entitled to invoke estoppel against the receiver from claiming a fund which does not rightfully belong to him, but on the other hand, in good conscience, belongs to appellant.

So, in the application of the substantive law of Arizona, measured by the decisions of the Supreme Court of Arizona, the position of appellant is eminently better; but, if it were not, federal courts in proceedings in equity apply the substantive law of the state only as it may be correlated with equitable remedies in the application of which federal courts are uncontrolled.

Dodge v. Tulleys, 144 U. S. 451, 456, 457, 12 S. Ct. 728, 36 L. Ed. 501;

Black & Yates v. Mahogany Ass'n., 129 F. (2d) 227, 223;

Mercantile-Commerce Bank & Trust Co. et al v. Southeast Arkansas Levee Dist. et al, 106 Fed. (2) 966, 970, 971.

In *Dodge v. Tulleys,* supra, the Supreme Court, in an authoritative decision, had occasion to ascertain whether or not the law of Nebraska, statutory and decisional, disallowing attorneys' fees provided for in a written instrument, deprived the federal courts of the right to fix attorneys' fees, and said:

> " * * * There is a stipulation in the trust-deed for the payment of an attorney's fee of $1,000, in case of foreclosure, but such stipulations have been held by the supreme court of Nebraska to be unauthorized. Dow v. Updike, 11 Neb. 95, 7 N. W. 857; Hardy v. Miller, 11 Neb. 395, 9 N. W. 475. It seems that in 1873 an act passed the legislature of Nebraska, expressly authorizing, in any written instrument for the payment of money, a stipulation for not exceeding 10 per cent. as an attorney's fee in case of suit. Gen. St. Neb. p. 98. This act was repealed in 1879. Laws Neb. 1879, p. 78. In the cases cited, the supreme court of the state held that by the repeal of the statute the contract right to recover attorney's fees was taken away. So, as this court follows the decisions of the highest court of the state in such matters (Bendy v. Townsend, 109 U. S. 665, 3 S. Ct. 482 (27 L. Ed. 1065), the provision in the trust deed for the payment of $1,000 as attorney's fees cannot be regarded as of binding force. But, while contract rights are settled by the law of the state, that law does not determine the procedure of courts of the United States sitting as courts of equity, or the costs which are taxable there, or control the discretion exercised in matters of allowances. Those courts acquire their jurisdiction and powers from another source than the state. There is no statute of Nebraska in respect to the matter. Even if there were one expressly prohibiting courts of equity from making allowances to trustees or their counsel, such prohibition would not control the proceedings in fed-

eral equity courts. They proceed according to the general rules of equity, except so far as such rules are changed by the legislation of congress; and while they may enforce special equitable rights of parties given by state statutes (Hollard v. Challen, 110 U. S. 15, 3 S. Ct. 495, 28 L. Ed. 52), yet their general powers as courts of equity are not determined and cannot be cut off by any state legislation. It is the general rule of equity that a trustee called upon to discharge any duties in the administering of his trust is entitled to compensation therefor, and including therein is a reasonable allowance for counsel fees. * * *"

(e) *A Bill of Review, or a Bill in the Nature of a Bill of Review, Will not Lie in this Case because Appellant, Having Accepted the Benefits of the Order of December 7, 1942, is Now Estopped from Reviewing Same; He Cannot Accept Its Benefits and Escape from Its Burdens.*

The contention of appellant under this subdivision of his brief is a continuation of the argument under subdivision (d). The acceptance by appellee, as receiver, of funds to which appellant was disallowed, through error, is an unjust enrichment of the receivership estate.

(f) *A Bill of Review for Errors Apparent on the Face of the Record Will Not Lie after the Time Allowed for Appeal Has Elapsed.*

The petition filed by appellant on March 31, 1944 (R. 599) requested the court to review and rehear the order entered December 7, 1942.

The prayer of the petition (R. 617, 618) is not limited to a particular remedy for the correction of the order entered December 7, 1942. On the other

hand, the trial court was requested to vacate the order of the trial court; to review the order as in the nature of a bill of review or an original bill in equity; to grant a rehearing of the order; and to modify and review the order. Each was directed to a request to correct the order of December 7, 1942. Lastly, appellant prayed for such other and further relief as may appear just and equitable.

The court entertained the petition filed March 31, 1944, and, after answer was filed, ordered a pretrial conference thereon; entered an order approving the issues there formulated; came to a decision, and denied the petition filed March 31, 1944. Thus, the order entered December 7, 1942 was opened and reexamined. Consequently the order of December 7, 1942 was placed under review as disclosed on pages 13 to 16 of appellant's opening brief.

(g) *A Bill of Review, or a Bill in the Nature of a Bill of Review, Will not Lie Where No Fraud Is Alleged, or Where There Is No Newly Discovered Evidence Claimed, Unless There is Error Apparent on the Face of the Record.*

The concession by all parties that the order entered December 7, 1942 is a final order avoids discussing the question of its appealibility. That it was a final appealable order is now settled.

Monaghan v. Hill, (9 Cir.) 140 Fed. (2d) 31.

The question with respect to the decision of this Court in *Monaghan v. Hill,* supra, changing the rule of law as a basis for correcting the order of December 7, 1942 in its application to appellant is not involved.

At the time appellant's petition came on for hearing he then requested only the amount he was awarded. He received that amount, less the amount which had theretofore been paid to him, and then reserved the right to claim more. At the time the order of December 7, 1942 was entered, appellant had not claimed compensation for the extensive services rendered to the receiver, and compensation for services rendered in the ancillary receiverships.

Appellant invokes the familiar rule that orders of a trial court, awarding compensation to attorneys for services performed in receivership matters, are under the continuing control of a trial court, especially where reservation was made to claim additional compensation. This question has been treated in the opening brief of appellant at pages 28 to 34.

(h) *The Time for Considering a Judgment or Order that Has Become Final Cannot Be Extended Unless a Motion to Review, Rehear, Modify, Revise or Vacate Such Order Has Been Seasonably Filed and That an Unseasonably Filed Motion or Petition, Although It May Be Considered On Its Merits, Cannot Have the Effect of Extending the Time to Appeal from the Original Order or Judgment.*

(i) *A Motion for Rehearing or a Motion for a New Trial Must Be Filed Seasonably and Within the Time Provided by the Rules of Civil Procedure.*

The burden of the argument under these subdivisions of appellee's brief is directed to the contention that *Bowman v. Loperena,* 311 U. S. 262, 85 L. Ed. 177, 61 S. Ct. 201; *Pfister v. Northern Illinois Co.,* 317 U. S. 144, 87 L. Ed. 146, 63 S. Ct. 133; and *Wayne United Gas Co. v. Owens-Illinois Glass Co.,*

300 U. S. 131, 81 L. Ed. 557, 57 S. Ct. 382, do not accord appellant the right of appeal from the order of December 7, 1942.

In support of the contention that the decisions of the Supreme Court last cited are inapplicable, counsel for appellee cite:

> *Safeway Stores, Inc. v. Coe, etc. et al* (CCA DC), 136 Fed. (2d) 771, 773;
>
> *Jusino et al v. Morales, etc.* (1 Cir.) 139 Fed. (2d) 946.

In the *Safeway Stores* decision injunction was sought against Coe, Commissioner of Patents, and another, seeking to enjoin the registration of a trademark. The Commissioner moved to dismiss, which was sustained October 17, 1941. On November 17, 1941 Safeway Stores filed a motion for rehearing which was denied January 17, 1942. On February 14, 1942 Safeway Stores appealed from that order and not from the order of October 17, 1941, dismissing the complaint. The Commissioner filed a motion to dismiss the appeal on the grounds that the order of January 17, 1942 was not appealable, and that the time for appealing from the original order had run. Here appellant has appealed both from the order entered December 7, 1942 and from the order denying appellant's petition for rehearing of that order entered November 29, 1944. (R. 666).

Safeway Stores invoked *Bowman v. Lopereno, Pfister v. Northern Illinois Co.* and *Wayne United Gas Co. v. Owens-Illinois Glass Co.,* supra. Those decisions would not have supported Safeway Stores' appeal because no appeal was taken from the original order dismissing the complaint. The Court of Appeals for the District of Columbia thought these de-

cisions did not apply because each involved suits in bankruptcy. At 136 Fed. (2d) 744, the court said:

> "* * * both the Loperena and Pfister cases were suits in bankruptcy, and the statements of the court were based, we think, on the distinctive nature of bankruptcy proceedings. This conclusion is supported by Wayne U. Gas Co. v. Owens, 300 U. S. 131, 136, 57 S. Ct. 382, 385, 81 L. Ed. 557, which applied a similar rule and upon which both later cases relied. That, too, was a bankruptcy case in which an untimely petition for rehearing was considered on its merits."

Associate Justice Miller dissented (136 Fed. (2d) 776).

We think, upon independent examination by this Court of the question here involved, that it will be ascertained that the rule of procedure announced by the Supreme Court in the *Lopereno, Pfister* and *Wayne* cases is derived from equity jurisprudence rather than from bankruptcy, and that the rule applied by the Supreme Court in those decisions to proceedings in bankruptcy is a rule of equity which bankruptcy has appropriated. The true rule is found in the authoritative decisions of the Supreme Court as exemplified by:

> *Local Loan Company v. Hunt,* 292 U. S. 234, 54 S. Ct. 695, 78 L. Ed. 1230.

In speaking of the essential nature of courts of bankruptcy, the Supreme Court in the case last cited said:

> "Courts of bankruptcy are constituted by sections 1 and 2 of the Bankruptcy Act, amended by Act May 27, 1926 (U.S.C., title 11, § § 1 and 11 (11 USCA § § 1, 11), and are invested 'with

such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings,' etc. The words 'at law' were probably inserted to meet clause (4) of section 2, 11 USCA § 11(4), which empowers such courts to arraign, try, and punish certain designated persons for violations of the act. Bardes v. Hawarden Bank, 178 U. S. 524, 534-536, 20 S. Ct. 1000, 44 L. Ed. 1175. But otherwise courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity. Bardes v. Hawarden Bank, supra, 535 of 178 U. S., 20 S. Ct. 1000; In re Rochford (C. C.A.) 124 F. 182, 187; In re Siegel-Hillman Dry Goods Co. (D.C.) 111 F. 980, 983; Swarts v. Siegel (C.C.A.) 117 F. 13, 16; Dodge v. Norlin (C.C.A.) 133 F. 363, 368, 369; In re Swofford Bros. Dry Goods Co., supra, at page 553 of 180 F.; In re Lahongrais (C.C.A.) 5 F. (2d) 899, 901; French v. Long (C.C.A.) 42 F. (2d) 45, 47. And, generally, proceedings in bankruptcy are in the nature of proceedings in rem, adjudications of bankruptcy and orders of discharge being, as this court clearly has treated them, in every essential particular decrees in equity determining a status. Hanover National Bank v. Moyses, 186 U. S. 181, 192, 22 S. Ct. 857, 46 L. Ed. 1113; Commercial Bank of Manchester v. Buckner, 20 How. 108, 118, 119, 15 L. Ed. 862."

And that principle is not departed from by the Supreme Court in the *Lopereno, Pfister* and *Wayne* cases, as exemplified by the following statement in the *Pfister* case (317 U. S. 152):

> "Courts of bankruptcy are courts of equity without terms."

Jusino et al v. Morales, etc., supra, falls in the same category as *Safeway Stores, Inc. v. Coe,* supra, although that was a statutory action for unpaid

wages and was not controlled by rules of equity. Another distinguishing feature of the *Safeway* and *Jusino* cases is that there was not involved in either the question of rehearing an order in an administrative proceedings in equity, particularly with respect to orders awarding compensation to an attorney for petitioning creditors in a class suit in equity.

(j) *Lack of Diligence in Filing Petition.*

In view of the contention of appellant that the order of December 7, 1942 was placed under review by the trial court by entertaining the petition filed March 21, 1944, the question of lack of diligence is not involved because the order of December 7, 1942 is now appealable.

(k) *The Failure of the Court to Find the Facts Specially and State Separately Its Conclusions of Law Thereon as Provided by Rule 52 Does Not Make the Judgment Void.*

Appellant is not in disagreement with the contention of appellee under this subdivision of his brief.

Appellant's original petition for compensation placed before the trial court only the question of the amount of compensation he was entitled to receive as attorney for the petitioning creditors in the main suit. That petition was not traversed by the receiver. Testimony in support of his petition by able and experienced counsel, as well as the testimony of appellant himself, which was not contradicted by the receiver, presented for determination by the trial court only the amount of award to be made to appellant, measured by the extent of his services and the benefits received by the petitioning creditors, individually, and as a class.

CONCLUSION

Appellant has not attempted to analyze the many decisions cited in the brief of appellee, first, because time does not permit, and, secondly, because the fundamental principles of equity to be applied in the disposition of this cause on appeal are not generalized but are confined rather to these settled principles:

(a) The power of a trial court to review a final administrative order in equity where no intervening rights are affected is an inherent power in equity, and the trial court controlling such proceedings is authorized to correct an order manifestly erroneous.

(b) Entertainment of a petition to rehear an erroneous order awarding counsel fees in an administrative proceedings in equity not closed, reopens the order for appeal although the petition to rehear is filed out of time.

(c) Estoppel by satisfaction of judgment arising from equity is itself subject to equitable limitations in that one who receives the benefit of a judgment, which in all events is less than an amount to which one is justly entitled to receive, is not deprived of the right of appeal when the person asserting the estoppel is not injured, and where the invocation of estoppel unjustly enriches a receivership estate at the expense of the person sought to be estopped.

For all that has now been said, it is again respectfully prayed that the orders of the trial court appealed from be reversed and remanded with direction that the trial court order payment to appellant

from the receivership assets such sum as appears to this Court adequate for all the services rendered.

Respectfully submitted,

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THOMAS W. NEALON,
In Propria Persona